IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

END CITIZENS UNITED PAC,

Plaintiff,

v.

FEDERAL ELECTION COMMISSION,

Defendant,

and

NEW REPUBLICAN PAC,

Defendant-Intervenor.

Case No. 1:21-cv-2128-RJL

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO NEW REPUBLICAN PAC'S CORRECTED MOTION TO DISMISS

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TABLE OF ABBREVIATIONS

CLC	Campaign Legal Center
CREW	Citizens for Responsibility and Ethics in Washington
ECU	End Citizens United PAC
FEC	Federal Election Commission
FECA	Federal Election Campaign Act
MUR	Matter Under Review
PAC	Political Committee

INTRODUCTION

In enacting the Federal Election Campaign Act ("FECA" or "the Act"), Congress made a number of policy choices. Substantively, it sought both to prevent actual or apparent corruption and to ensure transparency in political campaigns. To achieve the former goal, Congress set restrictions on the amounts and sources of contributions to candidates and their political committees, and limited campaigns' ability to coordinate with outside entities. In service of the latter aim, the Act requires political committees to disclose information about their fundraising and spending to the public and to the Federal Election Commission ("FEC" or "Commission"). Congress thus conferred on FEC-regulated entities a right to compete on a FECA-compliant political playing field, and on the public a right to the information of which the Act requires disclosure.

To ensure compliance with these substantive reforms, Congress crafted a robust enforcement regime. This enforcement scheme reserves a critical role for members of the public: Individuals or entities can file administrative complaints with the Commission alleging violations of FECA's requirements. If the agency dismisses or fails to act on a complaint, the complainant may seek redress in this Court. As the Supreme Court has recognized, this judicial review mechanism demonstrates "a congressional intent to cast the standing net broadly." *FEC v. Akins*, 524 U.S. 11, 19 (1998).

Plaintiff End Citizens United PAC ("ECU") put Congress's system into action by filing two administrative complaints with the FEC alleging violations of FECA's reporting requirements and contribution and coordination restrictions by its political competitors Rick Scott for Florida ("Scott Campaign"), New Republican PAC ("New Republican"), and then-Florida Governor (now U.S. Senator) Rick Scott (collectively, "the administrative respondents"). After the six-member Commission deadlocked 3-3 on whether to pursue ECU's allegations and subsequently dismissed

them, ECU invoked FECA's judicial review provision, filing this action to vindicate its statutory rights to information and to a FECA-compliant political playing field by challenging the dismissals as contrary to law.

New Republican has since intervened in the case and moved to dismiss. Where ECU seeks to use the judicial review scheme Congress crafted to give effect to its rights under FECA, Intervenor's motion attempts to unravel the review system to render the Act's substantive provisions dead letters. In New Republican's telling, standing to seek judicial review of FEC dismissals is rarely available, and, in any event, three Commissioners—potentially all of a single political party—can always shield a dismissal from review by purporting to exercise the FEC's prosecutorial discretion. In Intervenor's view, this Court is therefore powerless to review the lawfulness of the Commission's action.

Fortunately, Intervenor's view of the scope of this Court's authority is incorrect. The system Congress established authorizes this Court to review the dismissals of Plaintiff's administrative complaints. FECA entitles ECU both to compete on a legally compliant political playing field and to receive the information that the Act requires the administrative respondents to disclose. The Commission's dismissals of Plaintiff's allegations violate both of those rights, and the resulting injuries give ECU standing to bring this suit. Further, under the Act's robust judicial review provision, three Commissioners cannot insulate dismissals from scrutiny by invoking the FEC's prosecutorial discretion when the full agency has declined to exercise its prosecutorial discretion and the Commissioners' argument for exercising that discretion relies on erroneous legal conclusions and pretextual reasoning.

Because ECU has standing and the underlying FEC dismissals are reviewable, Plaintiff respectfully requests that the Court give effect to Congress's policy choices by denying New Republican's motion.

BACKGROUND

I. Statutory and Regulatory Background

A. FECA's Source and Amount Restrictions

To "limit the actuality and appearance of corruption resulting from large individual financial contributions," *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) (per curiam), FECA restricts the sources and amounts of contributions made "for the purpose of influencing any election for Federal office," 52 U.S.C. § 30101(8)(A)(i). As relevant here, individuals may contribute no more than $2,900 per election to a federal candidate and $5,000 per year to a political committee ("PAC").[1] *Id.* § 30116(a)(1)(A), (C). PACs generally may contribute no more than $5,000 per election to a candidate. *Id.* § 30116(a)(2)(A). Corporations may not contribute any amount to federal candidates and most PACs. *Id.* § 30118. Money subject to FECA's limits is colloquially called "hard money." *See, e.g.*, *Libertarian Nat'l Comm., Inc. v. FEC*, 924 F.3d 533, 546 (D.C. Cir. 2019).

B. Contributions and the Ban on Super PAC Contributions to Candidates

Under the Act, a contribution is "any gift . . . or deposit of money or anything of value made by any person for the purposes of influencing any [federal] election." 52 U.S.C. § 30101(8)(A). One type of contribution is a "coordinated expenditure"—that is, an expenditure "made by any person in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." *Id.* § 30116(a)(7)(B). One

[1] A PAC is any group of persons that has contributed or spent at least $1,000 to influence a federal election with the major purpose of nominating or electing a federal candidate. 52 U.S.C. § 30101(4)(A).

type of coordinated expenditure—and therefore one type of contribution—is a "coordinated communication." 11 C.F.R. § 109.21(b).

A "super PAC" is a type of political committee. Unlike other PACs, they are not subject to FECA's source and amount limitations, although they may make only independent expenditures and may not coordinate with candidates or their campaigns. *See SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc). Because super PACs can thus solicit and receive "soft money"—that is, contributions in unlimited amounts and from sources (like corporations) that FECA normally prohibits—they "may not make contributions to candidates . . . , including in-kind contributions such as coordinated communications." FEC Advisory Op. 2017-10 (Citizens Against Plutocracy) at 2. Moreover, candidates may not knowingly accept such excessive or prohibited contributions from super PACs. *See* 52 U.S.C. §§ 30116(f), 30118(a). Super PACs remain subject to FECA's reporting requirements. *See SpeechNow.org*, 599 F.3d at 689.

C. Candidacy

FECA and Commission regulations establish various fundraising restrictions and reporting requirements that take effect after an individual becomes a "candidate" under the Act. Within fifteen days of becoming a candidate, an individual must file a Statement of Candidacy that designates her principal campaign committee. 52 U.S.C. § 30102(e)(1); 11 C.F.R. § 101.1(a). That committee then has ten days to file a Statement of Organization. 52 U.S.C. § 30103(a). From that point on, the committee must file regular disclosure reports with the Commission. 52 U.S.C. § 30104(a); 11 C.F.R. § 104.1(a). These reports play a critical role in advancing the "First Amendment rights of the public to know the identity of those who seek to influence their vote." *Stop This Insanity Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10, 16 (D.C. Cir. 2014).

FECA and FEC regulations establish objective standards for whether an individual is a candidate. Under the Act, an individual becomes a "candidate" when she (or her agent) accepts or spends more than $5,000 for the purpose of influencing a federal election. 52 U.S.C. § 30101(2). The Commission's "testing the waters" exemptions allow an individual to raise and spend more than $5,000 without becoming a candidate if that money is used solely to assess whether to commit to a possible run, but those exemptions are unavailable to an individual who has already decided to become a candidate, as determined by objective indicators of intent. *See* 11 C.F.R. §§ 100.72(b), .131(b).

FEC rules again establish an objective inquiry to determine whether an individual can take advantage of the testing-the-waters exemptions. *See id.* §§ 100.72(b), .131(b); FEC Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) at 6; Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton, *et al.*) (Nov. 13, 2003). To assess whether an individual has triggered candidacy, the Commission considers a nonexhaustive list of "activities that indicate that an individual has decided to become a candidate." 11 C.F.R. §§ 100.72(b), .131(b). One such activity is "rais[ing] funds in excess of what could reasonably be expected to be used for exploratory activities or undertak[ing] activities designed to amass campaign funds that would be spent after he or she becomes a candidate." *Id.* §§ 100.72(b)(2), .131(b)(2).

D. The Soft-Money Ban

The Act bars candidates from using soft money: candidates may not "solicit, receive, direct, transfer, or spend funds in connection with [a federal] election . . . unless the funds are subject to the [Act's] limitations, prohibitions, and reporting requirements." 52 U.S.C. § 30125(e)(1). This soft-money ban also applies to a candidate's agents and any entity (including any PAC) "directly or indirectly established, financed, maintained, or controlled by or acting on behalf of" a candidate.

Id. "To determine whether a [candidate] directly or indirectly established, finances, maintains, or controls an entity" under § 30125(e)(1), the Commission considers ten nonexhaustive factors "in the context of the overall relationship between the [candidate] and the entity." 11 C.F.R. § 300.2(c)(2).

E. The Legal Framework for FEC Complaints

FECA allows any person to file a complaint with the Commission alleging a violation of the Act. 52 U.S.C. § 30109(a)(1). Based on the complaint and the FEC General Counsel's recommendations, the Commission then votes whether to find "reason to believe" that the subject of the complaint committed a violation. *Id.* § 30109(a)(2). A reason-to-believe decision, which requires four affirmative votes, does not trigger any penalties; rather, it initiates further investigation by the Commission. *See id.*

Following this investigation, and after considering input from the agency's General Counsel and the complaint's respondent, the Commission determines whether there is "probable cause to believe that [the respondent] has committed . . . a [FECA] violation." *Id.* § 30109(a)(3)-(4). If four Commissioners vote to find probable cause, the agency may seek civil penalties either through a conciliation agreement with the respondent or in federal court. *Id.* § 30109(a)(4)-(6).

If, at any stage, fewer than four Commissioners vote to proceed, the agency may vote to dismiss the complaint. *See, e.g.*, *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988). "Any party aggrieved" by dismissal of its complaint may seek review in this Court. 52 U.S.C. § 30109(a)(8). The court "may declare that the dismissal . . . is contrary to law, and may direct the Commission to conform with such declaration within 30 days." 52 U.S.C. § 30109(a)(8). If the agency does not comply with such an order, "the complainant may bring . . . a civil action to remedy the violation." *Id.* § 30109(a)(8)(C).

FEC dismissals are subject to judicial review under the contrary-to-law standard regardless of whether they result from a majority vote or a deadlock. *Democratic Congressional Campaign Comm. v. FEC*, 831 F.2d 1131, 1133 (D.C. Cir. 1987). When a complaint is dismissed after to a deadlock vote, the Commissioners who voted not to proceed with the matter "constitute a controlling group for purposes of the decision, [and] their rationale necessarily states the agency's reasons for acting as it did." *FEC v. Nat'l Republican Senatorial Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992). When the FEC declines to proceed with an administrative complaint "contrary to [its] General Counsel's recommendation to proceed," the "controlling Commissioners" who voted against pursuing the matter must issue a Statement of Reasons explaining their decision.[2] *Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988).

II. Statement of Facts

A. Scott Chairs New Republican, Which then Supports His Senate Candidacy

New Republican is a super PAC that registered with the FEC on May 8, 2013. AR64, 128; Compl., ECF No. 1, ¶ 33. The committee was active during the 2013-2014 election cycle, but subsequently lay largely dormant during the 2015-2016 cycle. AR 128-29.

In May 2017, Scott, then Governor of Florida, became New Republican's Chair. AR7. He subsequently hired a number of political allies to key roles within the organization and contracted with consultants who had previously worked on his campaigns. AR2, 7, 9, 13, 129. According to media reports, "political strategists in both parties viewed New Republican 'as a vehicle to raise money ahead of Scott's anticipated bid to unseat Democratic U.S. Sen. Bill Nelson in 2018.'" AR21, 129-30.

[2] As Plaintiff's dispositive motion explains, the controlling Commissioners' Statement of Reasons does not receive *Chevron* or *Auer* deference. *See* ECF No. 23 at 16-17.

New Republican greatly increased its fundraising—but not its spending—after Scott joined the organization. The super PAC raised more than $275,000 during Scott's first three weeks, nearly $1.2 million in 2017, and a further $1.2 million in the first quarter of 2018. AR1, 8, 130. These contributions included soft money in the form of both corporate and unlimited contributions. AR130. However, New Republican did not use these resources to make any independent expenditures or air any issue ads during Scott's tenure. AR130.

Scott claimed to have left New Republican in December 2017. AR54, 66. However, New Republican's website identified him as Chair until at least January 18, 2018, AR131, 143; a spokesman for his campaign indicated that he had remained with the super PAC until February 2018, AR 131-32, 143; media reports identified him as Chair until March 2018, AR77, 131-32; and he participated in New Republican fundraising events in March and August 2018, AR19, 54, 116, 132-33. Scott allies remained with the super PAC after his ostensible departure. AR68, 131.

Scott publicly declared his Senate candidacy on April 9, 2018. AR54. He submitted his Statement of Candidacy on April 8, and his campaign filed its Statement of Organization on April 10 and began filing disclosure reports later that year. AR54. The Scott Campaign's first FEC report disclosed testing-the-waters expenses of over $166,500 beginning in January 2018, but revealed no contributions or expenditures from 2017. AR126-27.

Before Scott publicly declared his candidacy on April 9, New Republican had already taken steps to support his campaign. In February and March 2018, the super PAC arranged and paid for a redesign of its website—made public on April 9—to promote Scott's candidacy. AR3, 30, 69, 139. In addition, New Republican commissioned and paid for a poll testing Scott's competitiveness against Nelson in March 2018. AR 29-30, 69, 73 ¶ 6, 133.

On May 3, New Republican released a television advertisement expressly advocating Nelson's defeat, and thereby promoting Scott's candidacy. AR78, 97. The super PAC released another advertisement for television and social media similarly opposing Nelson on June 11. AR78, 97. Ultimately, between May and November 2018, New Republican made over $30.5 million in independent expenditures, over $29.5 million of which supported Scott or opposed Nelson. AR134.

B. ECU Files Two Administrative Complaints

Like New Republican, Plaintiff ECU is a PAC that was active in the 2018 Florida Senate race. Corrected Decl. of Tiffany Muller ("Muller Decl."), ECF No. 24-1, ¶¶ 2, 7-10. ECU's mission is to get big money out of politics and protect the right to vote by working to elect reform-oriented politicians, pass meaningful legislative reforms, and elevate electoral issues in the national conversation. *Id.* ¶ 3. To advance that mission, and as part of a broader effort to elect Democratic Senate candidates, ECU actively participated in the 2018 Florida Senate race. *Id.* ¶¶ 5, 7. ECU endorsed and contributed to Scott's Democratic opponent, Nelson. *Id.* ¶¶ 7-9. ECU's endorsement and spending in the race were in direct political opposition to Scott, the Scott Campaign, and New Republican. *Id.* ¶ 10.

ECU had multiple reasons to petition the Commission to properly enforce the Act's requirements against the administrative respondents. First, ECU competes politically with those entities and will maintain that status in future years. As noted above, ECU engaged in direct political competition with the administrative respondents in 2018. *Id.* ¶¶ 7-10. This competition will continue through at least the 2024 Florida Senate election: Plaintiff intends to participate in that race through both political speech and expenditures, *id.* ¶¶ 4, 11, 14; Scott has already filed his Statement of Candidacy for that election, *id.* ¶ 12; *id.* Ex. A; and New Republican's website

continues to accept donations, *id.* ¶ 13; *id.* Ex. B-C. The FEC's failure to enforce FECA's requirements against ECU's political competitors places Plaintiff, which always seeks to comply with federal law, at a competitive disadvantage. *Id.* ¶¶ 15-16.

Second, ECU relies on accurate, timely FEC disclosure reports to fulfill its organizational mission. *Id.* ¶¶ 17-22. Plaintiff uses the information in these reports (1) to track outside and corporate spending in elections to highlight issues critical to ECU, such as dark-money spending in elections and the corrosive influence of single-candidate super PACs and corporate PACs, and to create reports, craft candidate messaging, and provide statements to the press, *id.* ¶¶ 18-19; (2) to determine how to allocate its resources in supporting or opposing candidates, making independent expenditures, and organizing to elect its favored candidates, *id.* ¶ 20; and (3) to determine whether to file FEC complaints against candidates and PACs that violate campaign finance laws, *id.* ¶ 21. ECU cannot perform these tasks or fulfill its mission without accurate, timely disclosures. *Id.* ¶¶ 18-22.

To protect these interests, ECU filed two administrative complaints alleging several distinct violations of the Act by Scott, the Scott Campaign, and New Republican. The first complaint, filed on April 10, 2018, and supplemented on April 17, alleged that Scott had failed to timely file a Statement of Candidacy under 52 U.S.C. § 30102(e)(1); that the Scott Campaign had failed to timely file a Statement of Organization and to submit required financial disclosures under 52 U.S.C. §§ 30103(a) and 30104; and that Scott and New Republican had violated the soft-money ban of 52 U.S.C. § 30125(e). AR3-5, 28. The FEC designated the matter initiated by this complaint as Matter Under Review ("MUR") 7370. AR1.

The second complaint, filed on September 5, 2018, alleged that the advertisements run by New Republican in May and June of 2018 had been made in coordination with Scott and his

campaign, such that New Republican had made, and Scott and his campaign had accepted, unlawful in-kind contributions. AR79-83. The FEC designated the matter initiated by this second complaint as MUR 7496. AR76.

C. The FEC's Office of General Counsel Recommends Finding Reason to Believe and Investigating ECU's Allegations

Based on ECU's administrative complaints; written responses by the administrative respondents; and all other available evidence, the FEC's General Counsel recommended that the Commission find reason to believe that (1) "Scott violated 52 U.S.C. § 30102(e)(1) by failing to timely file his Statement of Candidacy and designate a principal campaign committee," (2 & 3) the Scott Campaign "violated 52 U.S.C. §§ 30103(a) and 30104 by failing to timely file a Statement of Organization and disclosure reports," and (4) "New Republican violated 52 U.S.C. § 30125(e) by soliciting, receiving, or spending soft money." AR126. Because investigating these claims could reveal information material to ECU's remaining claims, the General Counsel further recommended that the Commission take no immediate action on the allegations that Scott himself violated the soft-money ban or that New Republican made impermissible in-kind contributions to Scott and the Scott Campaign in the form of coordinated communications. AR126.

These recommendations rested on two primary conclusions. First, "the available information indicate[d] that Scott became a federal candidate as early as 2017 because, as Chair of New Republican, he undertook activities designed to amass funds that were to be spent on supporting his Senate candidacy after he declared such candidacy in April 2018." AR137. Second, in light of this determination, "the available information supports a reasonable inference that Scott controlled New Republican and that New Republican and Scott were thus subject to the Act's soft money prohibitions from the time that Scott became a federal candidate." AR142.

D. The Commission Deadlocks 3-3 and Dismisses ECU's Claims

On May 20, 2021, the Commission deadlocked 3-3 on a motion to approve the General Counsel's recommendations. AR186-87. The motion failed because finding reason to believe requires four affirmative votes. *See* 52 U.S.C. § 30109(a)(2).

On June 10, the Commission declined, also by a 3-3 vote, to dismiss under *Heckler v. Chaney* the allegations that Scott failed to timely file a Statement of Candidacy and his campaign failed to timely file a Statement of Organization and required finance reports ("the Candidacy Filing allegations"). AR188. By the same margin, the Commission rejected a motion to find no reason to believe that New Republican violated the soft-money ban and to dismiss the remainder of the allegations. AR188-89. The FEC subsequently voted 5-1 to "[c]lose the file" on Plaintiff's administrative complaints, effectively dismissing them. AR189.

On July 21, the three controlling Commissioners who had voted to reject the General Counsel's recommendations issued a Statement of Reasons purporting to explain their decisions. AR203-13. The Statement indicated that the controlling Commissioners had "found no reason to believe that New Republican violated the soft money rules," and further claimed that they had "dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under *Heckler v. Chaney*." AR204.

III. Procedural History

ECU filed this action on August 9, 2021, challenging the dismissals of the claims in its complaints as contrary to law. Compl., ECF No. 1. The FEC, the sole defendant named in Plaintiff's complaint, failed to appear, plead, or otherwise defend the action, and the Clerk of Court entered default against the agency on November 2, 2021. *See* ECF No. 12. Prior to that default, on October 15, 2021, New Republican moved to intervene as a defendant in this case, filing a

proposed answer and motion to dismiss. *See* ECF Nos. 9, 14-15. The Court granted New Republican's motion to intervene. *See* Minute Order (Nov. 2, 2021).

On December 27, 2021, ECU filed its dispositive motion seeking default judgment or, in the alternative, summary judgment. *See* ECF No. 23. The same day, New Republican moved to dismiss or, in the alternative, for judgment on the pleadings. *See* ECF Nos. 22, 22-1 at 1 n.1.

LEGAL STANDARDS

To demonstrate Article III standing, a plaintiff must satisfy three basic requirements: injury in fact, causation, and redressability. *E.g.*, *Friends of Animals v. Jewell*, 824 F.3d 1033, 1040-41 (D.C. Cir. 2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)). While the plaintiff bears the burden of proving that the Court has subject matter jurisdiction to hear its claims, on a motion to dismiss, a plaintiff "need only 'state[] a plausible claim' that each element of standing is satisfied." *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016) (alteration in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). For purposes of a Rule 12(b)(1) motion, the Court "may consider materials outside the pleadings." *Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

Similarly, "[t]o survive a motion to dismiss" under Rule 12(b)(6), "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court "must take all of the factual allegations in the complaint as true," *id.*, and "construe[] the complaint liberally in the plaintiff's favor." *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 173 (D.C. Cir. 2006). In resolving a Rule 12(b)(6) motion, the Court "may consider the facts alleged in the complaint, documents attached thereto or incorporated therein, and matters of which it may take judicial notice." *Id.*

Finally, judgment on the pleadings is appropriate only where "the moving party demonstrates that no material fact is in dispute and that it is entitled to judgment as a matter of law." *Dist. No. 1, Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Liberty Mar. Corp.*, 933 F.3d 751, 760 (D.C. Cir. 2019) (quoting *Peters v. Nat'l R.R. Passenger Corp.*, 966 F.2d 1483, 1485 (D.C. Cir. 1992)). The Court must "accept as true the allegations in the [nonmovant's] pleadings, and as false all controverted assertions of the movant," *id.* at 761 (internal quotation omitted), and "give 'all reasonable inferences to the [nonmovant's] pleadings,'" *id.* (quoting *Wager v. Pro*, 575 F.2d 882, 884 (D.C. Cir. 1976)).

ARGUMENT

The Court has jurisdiction to hear this case, and the Commission's dismissals of ECU's allegations are reviewable. First, Plaintiff has standing to challenge the FEC's dismissals of the claims in its administrative complaints because the agency's decision injures ECU both as a political competitor of the administrative respondents and by denying it access to information of which FECA requires disclosure. Second, the controlling Commissioners' purported invocation of the FEC's prosecutorial discretion does not insulate the dismissals from judicial review because the full Commission declined to exercise its prosecutorial discretion, and the controlling Commissioners' argument for employing that discretion addresses only some of Plaintiff's allegations and relies on erroneous legal conclusions and pretextual reasoning.

I. Plaintiff Has Standing

ECU has suffered at least two distinct types of injuries sufficient to confer standing. First, the Commission's failure to enforce campaign finance laws against its political rivals inflicts a competitive injury. *See* ECF No. 23 at 17-19. Second, the administrative respondents' failure to file all disclosures required by FECA generates an informational injury. *See* ECF No. 23 at 19-22. These injuries result from the FEC's dismissals of the claims in Plaintiff's administrative

complaints—which prevent the agency from acting favorably on ECU's allegations—and are redressable by an order declaring those dismissals contrary to law. *See* ECF No. 23 at 22-23. Intervenor's motion does not dispute that ECU has sufficiently pleaded causation and redressability, and Intervenor's assertions that Plaintiff has suffered no injury are meritless.

A. Plaintiff Has Suffered Competitive Injuries

As Plaintiff's dispositive motion explains in full, the dismissals of its administrative complaints injure ECU as a political competitor of the administrative respondents. *See* ECF No. 23 at 17-19. When the Commission acts contrary to law in declining to enforce campaign finance laws, FEC-regulated competitors of the entities that benefit from non-enforcement suffer a competitive injury. *See Shays v. FEC*, 414 F.3d 76, 84-91 (D.C. Cir. 2005). In this case, the Commission's failure to act on ECU's allegations advantaged Plaintiff's political competitors—the administrative respondents—and thereby forced ECU to compete on an illegally structured playing field. *See id.*; ECF No. 23 at 17-18.

Nevertheless, Intervenor incorrectly claims that this form of political competitor standing is available only in challenges to regulations and that ECU does not cognizably compete with the administrative respondents. *See* ECF No. 22-1 at 13-15. Both arguments are meritless.

1. Political Competitor Standing Is Not Limited to Challenges to Regulations

Contrary to New Republican's arguments, *see* ECF No. 22-1 at 13-14, political competitor standing applies to review of administrative adjudications as well as to challenges to regulations. *Shays* referred to "regulations" because the facts of that case happened to involve a regulation; the court nowhere limited its holding to that context, contrasted suits challenging regulations with those involving enforcement actions, or suggested that political competitor standing is rare (as New Republican claims). *See Shays*, 414 F.3d at 83-95; *see, e.g.*, *Air Line Pilots Ass'n, Int'l v.*

Chao, 889 F.3d 785, 788 (D.C. Cir. 2018) (holding that *Shays* extends to "government action" generally and applying competitor standing to review an administrative adjudication). Instead, *Shays* itself relied on case law recognizing standing to challenge administrative adjudications, not just regulations. *See* 414 F.3d at 85-87.[3]

Furthermore, decisions both in this District and the D.C. Circuit also demonstrate that ECU has suffered competitive injuries sufficient to confer standing. Courts in this District have repeatedly employed competitor standing principles to recognize injuries in fact resulting from the FEC's dismissal of administrative complaints. *See La Botz v. FEC*, 889 F. Supp. 2d 51, 56 (D.D.C. 2012); *Buchanan v. FEC*, 112 F. Supp. 2d 58, 63-66 (D.D.C. 2000); *Natural Law Party of the U.S. v. FEC*, 111 F. Supp. 2d 33, 45-47 (D.D.C. 2000). *La Botz*, for example, applied *Shays* to find political competitor standing where a candidate sought review of the Commission's dismissal of his administrative complaint alleging that a media consortium had violated FECA by excluding him from debates. 889 F. Supp. 2d at 55-56. These decisions make clear that political competitor standing does not apply only to challenges to regulations.

The D.C. Circuit has similarly indicated that political competitor standing under *Shays* extends to review of the Commission's dismissal of administrative complaints. In *Nader v. FEC*, 725 F.3d 226 (D.C. Cir. 2013), the court explained that a plaintiff may have been able to rely on a

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[3] For example, *Shays* relied on competitor-standing precedents allowing "drug producers [to] challenge permits for other manufacturers," 414 F.3d at 86 (citing *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 11-12 (D.C. Cir. 1998)), which are challenges that involve administrative adjudications rather than regulations, *see id.*; *MD Pharm.*, 133 F.3d at 11-12. *Shays* explained that these precedents "embody [the] principle" underlying political competitor standing. 414 F.3d at 87. In addition, *Shays* also relied on a line of cases applying the procedural rights doctrine, and in doing so, cited *Lujan*'s observation that individuals would have standing to enforce "the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them." *Id.* at 85 (quoting *Lujan*, 504 U.S. at 572). Such a suit would involve an administrative adjudication, not a challenge to a regulation. *See Lujan*, 504 U.S. at 572.

competitive injury to support standing to seek review of the FEC's dismissal of his administrative complaint had he also satisfied the causation and redressability requirements for standing by showing that the agency's decision "injured his ability to fight the next election." *See id.* at 229. Although the court ultimately concluded that the *Nader* plaintiff lacked standing because he failed to allege sufficiently concrete plans to compete politically in the future, rendering his injury unredressable, the decision thus acknowledged that a plaintiff who *did* have definite plans to compete in the future could claim standing under *Shays*. *See id.* at 228-29. New Republican therefore mischaracterizes *Nader* in asserting that the decision categorically "held that a Plaintiff who challenges a FEC dismissal cannot base standing" on an alleged competitive injury. ECF No. 22-1 at 13. On the contrary, *Nader* in fact indicated that a plaintiff could base standing precisely on such an injury, so long as the plaintiff could also establish redressability. *See* 725 F.3d at 229.

Here, New Republican's motion does not allege that Plaintiff's injury is not redressable, and, in any event, ECU has submitted evidence that it intends to be actively engaged in the 2024 Florida Senate race, Muller Decl., ¶¶ 6, 11, 14; that Senator Scott has already filed a statement of candidacy for that election, *id.* ¶ 12; and that New Republican "continues to solicit contributions," *id.* ¶ 13, thus establishing that, unlike the plaintiff in *Nader*, it will continue to compete politically with the respondents from its administrative complaints in the future. *See also* Compl., ECF No. 1, ¶ 17 (explaining that ECU will compete with the administrative respondents in the future). In short, *Nader*, too, demonstrates that ECU has political competitor standing to seek review of the dismissals underlying this case.

Finally, as explained in ECU's dispositive motion, ECF No. 23 at 18, the competitive injury suffered by ECU due to the FEC's faulty adjudication of its administrative complaint is even clearer than the injury found in *Shays*. While *Shays* recognized an injury based merely on potential

future BCRA violations, ECU's administrative complaints documented—and the FEC's General Counsel acknowledged—actual, concrete FECA violations by ECU's political competitors, the Scott Campaign and New Republican. AR3-5, 28, 79-83, 126. Moreover, unlike the Congressmembers in *Shays*, who, if their regulatory challenge had failed, could at least have benefitted from engaging in the allegedly illegal activity on the same terms as their rivals under the challenged regulations, *see* 414 F.3d at 86, ECU cannot violate FECA as its competitors did without risking FEC enforcement, and has no way of obtaining benefits like those received by the Scott Campaign or New Republican. *See also* Muller Decl. ¶ 16 (explaining that "ECU always seeks to comply with federal law"); *id.* ¶ 2 (explaining that ECU, unlike New Republican, abides by FECA's amount and source limitations).

In sum, *Shays* and its progeny apply to judicial review of administrative adjudications, as well as in challenges to regulations, and support ECU's standing in this case.

2. ECU Is a Political Competitor of Scott, the Scott Campaign, and New Republican with Concrete Interests in Effective Fundraising and Spending and Electoral Success

Plaintiff competes with the administrative respondents in at least two concrete, cognizable ways. *Contra* ECF No. 22-1 at 14. *Shays* did not limit political competitor standing to candidates, but instead recognized that "parties defending concrete interests" in a competitive environment can invoke the doctrine. 414 F.3d at 87. In this action, ECU, which operates within the FEC-regulated competitive political environment, seeks to defend both (1) an economic interest in fundraising and spending on equal terms with its rivals and (2) a concrete interest in the electoral success of the candidates it financially supports. As a result, ECU has political competitor standing under *Shays*.

First, ECU competes with Scott, the Scott Campaign, and New Republican to defend its economic interest in fundraising and spending on equal terms with its rivals. A plaintiff's pecuniary interest in successfully competing economically with its competitors is a well-established concrete interest supporting standing. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970); *Shays*, 414 F.3d at 85-87; *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 870 (D.C. Cir. 2001).

Here, by allowing ECU's competitors to engage in unlawful fundraising practices and correspondingly increased spending, the FEC dismissals injure Plaintiff by forcing it to either increase its fundraising and spending or else lose out in the business of persuading voters and electing its preferred candidates. Economic injuries sufficient to confer standing include "los[ing] sales to rivals, or be[ing] forced to . . . expend more resources to achieve the same sales" as a result of an agency decision that "lift[s] regulatory restrictions on [a party's] competitors." *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (internal quotation omitted); *see, e.g.*, *Cement Kiln*, 255 F.3d at 870. In *Cement Kiln*, for example, the D.C. Circuit recognized that a plaintiff association suffered an injury in fact where an agency action would allow competitors of the plaintiff's members to pay lower environmental compliance costs. *See* 255 F.3d at 870. "Basic economics indicate[d]" that the agency's decision would enable the competitors to offer lower prices, and "one [could] reasonably expect this to result in lost business to the [plaintiff's] members." *Id.* Later, in *Shays*, the D.C. Circuit explained that its cases "support analogizing [political competitors'] situation to business rivalry, a context where . . . ample precedent supports standing." 414 F.3d at 87. Drawing that analogy, the court found that the plaintiffs suffered competitive injury from the "*intensified* competition" resulting from the FEC allowing plaintiffs' rivals to spend in violation of FECA. *Id.* at 86 (emphasis in original).

In this case, the FEC's dismissals of Plaintiff's administrative complaints allow Scott, the Scott Campaign, and New Republican to engage in unlawful fundraising practices and thereby raise and spend more money to benefit candidates that ECU opposes. ECU thus faces "*intensified* competition," in that ECU "must anticipate and respond to a broader range of competitive tactics than federal law would otherwise allow." *Shays*, 414 F.3d at 86. As in *Cement Kiln*, "[b]asic economics indicates" that ECU will therefore need either to raise and spend increased sums to compete or else experience the "lost business" of persuading fewer voters and failing to elect its preferred candidates. 255 F.3d at 870. ECU's complaint and the declaration of its President and Executive Director confirm that the competitive fundraising advantage the dismissals confer on the administrative respondents "forces Plaintiff to spend its resources countering its opponents' illegally raised funds." Compl., ECF No. 1, ¶ 18; Muller Decl. ¶¶ 14-15. In other words, the dismissals force Plaintiff either to "lose sales to rivals, or be forced to . . . expend more resources to achieve the same sales," *Sherley*, 610 F.3d at 72, creating an injury in fact.

Second, ECU competes with the administrative respondents to defend its concrete interest in the electoral success of the candidates it financially supports. *Shays* itself acknowledged that election to office represents a concrete interest that supports political competitor standing. *See* 414 F.3d at 87. Moreover, *Shays* indicated that competition to defend this interest extends not just to candidates, but also to "candidates *and parties* 'in a position' to exploit FEC-created loopholes." *Id.* (emphasis added) (citation omitted) (quoting *Gottlieb v. FEC*, 143 F.3d 618, 621 (D.C. Cir. 1998)); *see also id.* at 86 (citing, as examples of potential competitors who could exploit FEC-created loopholes, a rival candidate's "supporters," and "rival state parties"); *see also Chamber of Com. of the U.S. v. FEC*, 69 F.3d 600, 603 (D.C. Cir. 1995) (stating that if the FEC failed to enforce its rules governing nonprofit corporations, "a political competitor could challenge the

Commission's dismissal of its complaint"). While the *Shays* plaintiffs happened to be candidates, nothing in *Shays* limits the availability of political competitor standing to candidates; instead, the ruling indicates that political competitor standing is available to FEC-regulated entities, such as parties and political committees, more broadly when those entities are subject to the same legal requirements. *See* 414 F.3d at 86-87.[4]

Here, the uncontested evidence establishes that ECU and the administrative respondents have sought and will continue to seek to place rival candidates in office: in 2018, the administrative respondents worked to elect Scott, while ECU supported his Democratic opponent, and that competitive relationship will endure through at least the 2024 election. *See* Muller Decl. ¶¶ 4-14; Compl., ECF No. 1, ¶¶ 16-17. Moreover, ECU competes to defend these interests in the same FEC-regulated arena in which the administrative respondents operate. ECU is a registered political committee, *see* Muller Decl. ¶ 2; Compl., ECF No. 1, ¶ 15, and "face[s a] genuine rivalry from" the administrative respondents, who, as political committees and an associated candidate, are also subject to FECA (including its soft-money ban) and the FEC's regulations, and with whom ECU competes, and will continue to compete, in private fundraising, spending, and electoral success. *See* Muller Decl. ¶¶ 4-14; Compl., ECF No. 1, ¶¶ 16-17. Indeed, but for its commitment to following the law, *see* Muller Decl. ¶ 16; Compl., ECF No. 1, ¶ 18, and the risk that it would suffer FEC sanctions, ECU could in theory engage in the same type of illegal scheme as the

[4] For example, *Shays* explained that in its ruling in *Gottlieb v. FEC*, the court held that a PAC could not assert political competitor standing to challenge a candidate's use of public matching funds, but only because the PAC "'was never in a position to receive matching funds itself'" and thus not in a position to compete for those public funds. 414 F.3d at 87 (quoting *Gottlieb*, 143 F.3d at 621). In contrast, here, ECU is an FEC-registered and -regulated PAC that directly competes with the administrative respondents in private fundraising, spending, and electoral success, while subject to FECA's source and amount fundraising restrictions, including the soft-money ban. *See* Muller Decl. ¶¶ 2, 4-14; Compl., ECF No. 1, ¶¶ 15-17.

administrative respondents allegedly did.[5] ECU thus competes with the administrative respondents in a cognizable sense within the FEC-regulated arena.

In sum, ECU has suffered a cognizable competitive injury and has political competitor standing to seek review of the underlying dismissals.

B. Plaintiff Has Suffered Informational Injuries

"The law is settled that a denial of access to information qualifies as an injury in fact where a statute (on the claimants' reading) requires that the information be publicly disclosed and there is no reason to doubt their claim that the information would help them." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020) (quoting *Envtl. Def. Fund v. EPA*, 922 F.3d 446, 452 (D.C. Cir. 2019)). Plaintiff's dispositive motion explains how the dismissals of the underlying administrative complaints deprived ECU of at least two types of information to which FECA entitled it and how that information would help ECU. *See* ECF No. 23 at 19-22. Intervenor's argument that ECU has not been deprived of any information of which FECA requires disclosure, *see* ECF No. 22-1 at 15-25, is without merit.[6]

1. The Dismissals Deprive ECU of Information About Scott and the Scott Campaign's Fundraising and Spending During 2017 and Early 2018

As Plaintiff's dispositive motion explains, Plaintiff has been denied information contained in the disclosure reports Scott and the Scott Campaign should, on Plaintiff's view of the law, have

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[5] The fact ECU could in theory engage in the same type of illegal scheme does not defeat its standing, "because being put to the choice of either violating [FECA] or suffering disadvantage" in its political competition with the administrative respondents "is itself a predicament that the statute spares" ECU, and so "having to make that choice constitutes an Article III injury." *Shays*, 414 F.3d at 89.

[6] Intervenor's motion does not argue that any information disclosed would not help ECU, and Plaintiff's dispositive motion, the declaration attached thereto, and the complaint in this case explain why Plaintiff satisfies that requirement. *See* ECF No. 23 at 21-22; Muller Decl. ¶¶ 17-22; Compl., ECF No. 1, ¶ 19.

begun filing in 2017. *See* ECF No. 23 at 19-20. Contrary to Intervenor's assertion that "Plaintiff does not allege that any of the administrative respondents failed to file a required financial activity report," ECF No. 22-1 at 22, ECU has repeatedly explained that Scott and the Scott Campaign failed to timely file required documents—including a Statement of Candidacy, Statement of Organization, and regular disclosure reports—beginning when, in Plaintiff's view, Scott became a candidate in 2017. *See, e.g.*, ECF No. 23 at 19-20, 23-27; Compl., ECF No. 1, ¶¶ 11, 54 ("Plaintiff's administrative complaints established reason to believe that . . . Scott . . . fail[ed] to timely file his Statement of Candidacy[, and the Scott Campaign] . . . fail[ed] to timely file a Statement of Organization and required disclosure reports . . . .").

As a result, Intervenor's argument that Plaintiff does not seek any information of which FECA requires disclosure misses the mark. Rather, ECU has been deprived of information that FECA required Scott and the Scott Campaign to report in 2017 and early 2018 that was not ultimately disclosed in the Scott Campaign's later reports. FECA requires candidates to file quarterly financial reports. 52 U.S.C. § 30104(a)(2)(A)(iii), (B). The Scott Campaign filed its first quarterly report on July 16, 2018, covering the reporting period from April 1 to June 30, 2018. AR127. That report claims that Scott's post-candidacy financial activity started on April 4, 2018. AR127. However, Plaintiff has alleged that Scott became a candidate as early as becoming Chair of New Republican in May 2017, *e.g.*, ECF No. 1, ¶ 46, and so on Plaintiff's view of the law, the Scott Campaign was required to file its first quarterly report (covering the reporting period from April 1 through June 30, 2017) on July 15, 2017—a *full year* earlier than it did, *see* FEC.gov, Quarterly Reports, https://www.fec.gov/help-candidates-and-committees/filing-reports/quarterly-reports (detailing candidate committee quarterly filing requirements and reporting periods). Not only did the Scott Campaign not file a quarterly report on July 15, 2017, it also failed to file *three*

additional reports covering the subsequent reporting periods spanning July 1, 2017, through March 31, 2018. ECU thus suffered an injury as a result of being deprived of the information that would have been contained in those absent reports. *Cf. CLC v. FEC*, 520 F. Supp. 3d 38, 45-46 (D.D.C.) ("To the extent that Bush was *either* a de-facto candidate *or* testing the waters at some point prior to June 2015, then plaintiffs have alleged an informational injury because further disclosures would be required."), *reconsidered*, No. 20-cv-00730, 2021 WL 6196985 (D.D.C. Dec. 30, 2021).

Although the *CLC* court reconsidered its ruling after Plaintiff filed its dispositive motion, that court did not repudiate its original reasoning; rather, it determined that new evidence established that all of the information at issue—details of testing-the-water expenses from Jeb Bush's 2016 presidential campaign—had been reported. *See* 2021 WL 6196985, at *3-5. In particular, the intervenor-defendant in that case submitted a declaration from Bush's director of scheduling explaining the campaign's accounting, and described in detail how various contributions and expenditures had been reported. *See id.* at *4. Intervenor in this case has taken no such steps to rebut Plaintiff's allegations. Moreover, the fact that, on Plaintiff's view of the law, Scott and his campaign failed to file up to four required reports detailing post-candidacy financial activity distinguishes this case from *CLC*. While Bush and his campaign did not need to file any additional reports—the dispute in that case centered around reporting of Bush's testing-the-waters expenses, rather than his date of candidacy, *see id.* at *2—Scott's becoming a candidate as early as May 2017 would, as Plaintiff has explained, have required him to file a Statement of Candidacy and his campaign a corresponding Statement of Organization and regular disclosure reports substantially earlier than they did. *See, e.g.*, ECF No. 23 at 19-20, 23-27; Compl., ECF No. 1, ¶¶ 11, 54. Without those filings, Plaintiff cannot know the full scope of the reportable financial

activity Scott engaged in while he was involved with New Republican during the period after he became a candidate but before his campaign began filing required disclosures.

2. The Dismissals Deprive ECU of Information About the Amounts that New Republican Contributed to the Scott Campaign Through Coordinated Communications

A political committee's failure to file "accurate disclosure[] of contributor information" creates an informational injury under FECA. *CLC*, 952 F.3d at 356. Plaintiff's complaint alleges, and its dispositive motion explains, that both New Republican and the Scott Campaign failed to report coordinated communications in the manner required by FECA and Commission regulations. *See* ECF No. 23 at 20-21; Compl., ECF No. 1, ¶¶ 11, 55. On Plaintiff's view of the law, as alleged both in its second administrative complaint and in the complaint in this action, advertisements run by New Republican in May and June of 2018 were produced in coordination with Scott and the Scott Campaign, and therefore constituted in-kind contributions that FECA required both New Republican and the Scott Campaign to disclose. *See* Compl., ECF No. 1, ¶¶ 11, 55; AR79-83; *see also* 52 U.S.C. § 30104(a); 11 C.F.R. § 109.21. However, neither committee reported such contributions. AR97-99, 116-19. As a result, ECU cannot discern from current reports which of New Republican's expenditures paid for the allegedly coordinated advertisements rather than for other expenses. The FEC, in dismissing Plaintiff's complaints and thereby failing to address this lack of filing, therefore deprived ECU of the "accurate disclosure[] of contributor information" to which FECA entitles it, creating an informational injury.

Critically—and contrary to New Republican's argument, *see* ECF No. 22 at 25—ECU does not seek merely a declaration that the expenditures were coordinated. Rather, FECA entitles Plaintiff to more detailed, disaggregated disclosure of expenditures related to the coordinated communications at issue. *Wertheimer v. FEC*, 268 F.3d 1070 (D.C. Cir. 2001), and the cases

Intervenor cites applying it are therefore inapposite. In *Wertheimer*, the plaintiffs, who knew *all* the underlying details of a set of allegedly coordinated expenditures, sought merely an FEC declaration that those expenditures were coordinated. *See id.* at 1074-75. The expenditures had been publicly reported, itemized, and "label[ed] . . . as a discrete category." *Id.* at 1074. In this case, on the other hand, the expenditures New Republican made in service of the alleged coordinated communications are not disaggregated, itemized, or specially labeled. Existing reports do not inform ECU which of New Republican's expenditures paid for the allegedly coordinated advertisements rather than for other expenses, including genuine independent expenditures. Had New Republican properly treated the advertisements as coordinated communications, however, FECA and Commission regulations would have required the super PAC to report those expenditures separately as in-kind contributions—notwithstanding the unlawful nature of the transactions. *See* 52 U.S.C. § 30116(a)(7)(B); 11 C.F.R. § 109.21(b). That designation would give ECU more information about the details of New Republican's activities. Plaintiff thus does not seek a legal determination, but concrete information of which FECA and FEC regulations require disclosure. ECU therefore has informational standing to bring this case.

C. Plaintiff's Injuries Were Caused by the Dismissals and Are Redressable by an Order that the Dismissals Were Contrary to Law

Intervenor's motion does not argue that ECU does not satisfy the causation and redressability prongs, nor could it realistically do so. As Plaintiff's dispositive motion explains, injuries that result from an agency's dismissal of an enforcement action are traceable to the agency's decision and redressable by an order vacating that decision. *See Akins*, 524 U.S. at 25; ECF No. 23 at 22-23; *see also, e.g.*, *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 440 (D.C. Cir. 1998) ("[T]he causation requirement . . . is met when a plaintiff demonstrates that the challenged agency action authorizes the conduct that allegedly caused the plaintiff's injuries, if

that conduct would allegedly be illegal otherwise."). Here, the dismissals of Plaintiff's allegations prevent the FEC from resolving the matter in ECU's favor, and an order that the dismissals are contrary to law would redress the injury by removing that unlawful barrier to favorable action on the complaints.

II. The Dismissals of Plaintiff's Claims Are Reviewable

The controlling Commissioners' purported invocation of prosecutorial discretion does not insulate the dismissals of Plaintiff's allegations from judicial review.[7] Although the D.C. Circuit has explained that FEC dismissals based on prosecutorial discretion are sometimes unreviewable, *see Citizens for Resp. & Ethics in Wash.* [("*CREW*")] *v. FEC*, 993 F.3d 880, 884-85 (D.C. Cir. 2021) ("*CREW 2021*"); *CREW v. FEC*, 892 F.3d 434, 440-42 (D.C. Cir. 2018) ("*CREW 2018*"), the *CREW* decisions do not preclude review here. First, the controlling Commissioners did not purport to rely on prosecutorial discretion in dismissing ECU's soft-money and coordinated-communications allegations. Second, because the full FEC voted on the record not to exercise the agency's prosecutorial discretion, the controlling Commissioners' attempt to invoke that discretion was ineffective. In addition, the controlling Commissioners' purported exercise of prosecutorial discretion rested on erroneous legal conclusions and pretextual reasoning. For these reasons—explained further in Plaintiff's dispositive motion, *see* ECF No. 23 at 36-45—the dismissals underlying this case are reviewable.

[7] Plaintiff notes that, contrary to Intervenor's argument, *see* ECF No. 22-1 at 26, "reviewability is not a jurisdictional issue." *CLC v. FEC*, 952 F.3d 352, 356 (D.C. Cir. 2020).

A. The Controlling Commissioners Did Not Purport to Exercise Prosecutorial Discretion to Dismiss the Soft-Money and Coordinated-Communications Claims

If the FEC relies on prosecutorial discretion to dismiss one allegation in an administrative complaint, a court may still review the agency's dismissal of other claims in the complaint for which the agency did not rely on prosecutorial discretion. *See CREW 2018*, 892 F.3d at 438 n.6 (citing *Akins*, 524 U.S. at 25). In *Akins*, for example, the Supreme Court reviewed the Commission's dismissal of "one of two charges in a complaint" after the agency "invoked prosecutorial discretion to dismiss the other charge." *Id.* (citing *Akins*, 524 U.S. at 25). Thus, even if the controlling Commissioners could invoke prosecutorial discretion to shield the dismissals of some of ECU's allegations from judicial review—which, as discussed below, they could not—that preclusion of review would apply only to the claims for which the Commissioners actually purported to exercise prosecutorial discretion.

As explained in Plaintiff's dispositive motion, *see* ECF No. 23 at 37, the Statement of Reasons in this case makes clear that the controlling Commissioners purported to exercise prosecutorial discretion only with respect to ECU's Candidacy Filing allegations, leaving the remainder of the dismissals reviewable. At multiple points, the Statement expressly contrasts the reasoning underlying the different dismissals. For example, the controlling Commissioners state that they "found no reason to believe that New Republican violated the soft money rules and dismissed the allegations that Scott untimely filed his candidacy and organization paperwork under *Heckler v. Chaney*." AR204. Elsewhere, the Statement reiterated that the controlling Commissioners "voted to find no reason to believe that New Republican violated the soft money ban, exercised our prosecutorial discretion regarding the [Candidacy Filing] allegations . . . , and dismissed the remaining allegations . . . for lack of evidence." AR 212-13. That is, the

Commissioners reached a substantive conclusion about the merits of the soft-money claims and, separately, invoked prosecutorial discretion to dismiss the Candidacy Filing allegations.

Intervenor's attempts to bring the dismissals of ECU's other allegations under the cover of prosecutorial discretion are unavailing. "It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 758 (2015)); *see also Akins*, 524 U.S. at 25 (reviewing FEC dismissal even though, on remand, agency might invoke prosecutorial discretion to dismiss complaint). While the controlling Commissioners noted that some of ECU's claims were related, *see* AR209, the Statement of Reasons nonetheless makes clear that they sought to invoke prosecutorial discretion only with respect to the Candidacy Filing allegations. Because the controlling Commissioners did not actually rely on prosecutorial discretion to dismiss the soft-money or coordinated-communications allegations, the dismissals of those claims are reviewable.

B. The Dismissals Are Reviewable Because the Commission Expressly Declined to Exercise Its Prosecutorial Discretion

As Plaintiff's dispositive motion explains, *see* ECF No. 23 at 37-41, even to the extent the controlling Commissioners purported to exercise the FEC's prosecutorial discretion, that invocation was ineffective because the full agency voted explicitly on the record not to exercise that discretion. FECA mandates that "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under . . . this Act shall be made by a majority vote." 52 U.S.C. § 30106(c). One of these "powers" is the option to dismiss a complaint as a matter of prosecutorial discretion. *Akins*, 524 U.S. at 25. The record here shows that the Commission voted on whether to employ that discretion to dismiss the same allegations that the controlling Commissioners later claimed in their Statement of Reasons to dismiss as a matter of prosecutorial discretion. AR188, 204. Those

votes failed. AR188. In other words, the Commission expressly declined to exercise its prosecutorial discretion, with the controlling Commissioners on the losing end of that 3-3 vote. AR188. So, while the controlling Commissioners may be "controlling" with respect to the dismissal (because they voted against moving forward with the matter), they are not "controlling" with respect to the agency's vote not to exercise its prosecutorial discretion. The controlling Commissioners thus had no authority under the Act to override that vote. *See* 52 U.S.C. § 30106(c) (requiring majority vote). The purported exercise of prosecutorial discretion in the Statement of Reasons therefore cannot shield the dismissals from review because *there was no exercise of prosecutorial discretion*. Indeed, as Plaintiff's dispositive motion describes, the full Commission's on-the-record vote not to exercise its prosecutorial discretion distinguishes this case from *CREW 2018* and *CREW 2021*, as well as other precedents involving review of FEC deadlocks, none of which featured such a vote. *See* ECF No. 23 at 38-41. As a result, all of the underlying dismissals are reviewable.

C. The Dismissals Are Reviewable Because the Invocation of Prosecutorial Discretion Relied on Erroneous Legal Reasoning

As *CREW 2018* acknowledged, FEC dismissals remain reviewable where the FEC exercises its discretion "on the basis of [the Commission's] interpretation of FECA." 892 F.3d at 441 n.11; *see also CREW 2021*, 993 F.3d at 884-85 (acknowledging that dismissal that "rests solely on legal interpretation" remains reviewable). The purported invocation of prosecutorial discretion in this case is therefore reviewable because it rested entirely on two legal errors.

First, the controlling Commissioners erred in their conclusion that determining when Scott became a candidate would require "prob[ing] his subjective intent." AR212. In fact, the candidacy inquiry is objective. The controlling regulations call for the Commission to examine whether an individual has engaged in "activities indicating that an individual has decided to become a

candidate," not whether the candidate has subjectively decided to run. *See* 11 C.F.R. §§ 100.72(b), .131(b); *see also* 52 U.S.C. § 30101(2) (defining "candidate" based on objective measures of contributions received or expenditures made, rather than subjective intent). Commission precedent confirms the "objective" nature of the inquiry. FEC Advisory Op. 2015-09 (Senate Maj. PAC, *et al.*) at 5; *see* Factual and Legal Analysis at 7-8, MUR 5363 (Sharpton, *et al.*) (Nov. 13, 2003); *see also* AR136-37 (explaining that the inquiry is "objective[]"). Yet the controlling Commissioners' erroneous conclusion that resolving the Candidacy Filing allegations would require a subjective inquiry was the basis for all of the justifications their Statement of Reasons offered for exercising the FEC's discretion. *See* AR212. Thus, the Commissioners' legal error underlay their attempted exercise of prosecutorial discretion.

Second, the controlling Commissioners also rested their invocation of prosecutorial discretion on their legal conclusions about the merits of ECU's allegations. The Statement of Reasons termed the facts in the record too "thin [an] evidentiary reed" to justify pursuing the matter. AR212. That is, the decision to attempt to exercise the FEC's prosecutorial discretion relied on the controlling Commissioners' view of the legal merits of ECU's claims (which, in turn, relied on their legal error regarding the nature of the candidacy inquiry). Because the controlling Commissioners thus based their effort to exercise the agency's discretion on their legal reasoning, the resulting dismissals are reviewable.[8]

The fact that the Statement of Reasons discussed discretionary concerns such as resource allocation and competing priorities does not change this conclusion because the controlling

[8] The controlling Commissioners' reliance on their legal reasoning renders the dismissals reviewable. *See Crew 2018*, 892 F.3d at 441 n.11. The fact that the merits of ECU's allegations were quite strong, *see* ECF No. 23 at 23-36 (explaining that the dismissals were contrary to law), renders them contrary to law. *See Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986).

Commissioners explicitly invoked those considerations only because of their underlying legal errors. Specifically, the controlling Commissioners expressed concern about the scope, cost, and invasiveness of the investigation "[t]o probe [Scott's] subjective intent," AR212 (emphasis added), that they had erroneously concluded FECA would require. Because the controlling Commissioners' dismissals were built upon a foundation of legal errors, they are reviewable.

Nor does *CREW 2021*, on which Intervenor heavily relies, preclude review here. While that decision stated that a Commission dismissal is unreviewable if it "rests even in part on prosecutorial discretion," the court emphasized that the invocation of prosecutorial discretion in that case was entirely separate from any interpretation of FECA: the dismissal "rested on two distinct grounds," 993 F.3d at 884, as "prosecutorial discretion [was] exercised *in addition to the legal grounds*" given by the Commission, *id.* at 887. Put another way, the Commission's decision "rested squarely on prudential and discretionary considerations . . . offered . . . *in addition to* [the agency's] legal analysis." *Id.* at 886 (emphasis added). Thus, the court would have had no standard by which to review the agency's decision to exercise its discretion, *see id.* at 885, and any review of the Commission's legal reasoning would amount to an impermissible advisory opinion because the exercise of discretion provided an adequate and independent basis for the agency's decision, *see id.* at 889. In other words, *CREW 2021* held that an FEC dismissal is unreviewable if it rests even partly on an invocation of prosecutorial discretion *that is independent of the agency's legal reasoning*. In contrast, as explained above, the purported exercise of prosecutorial discretion in this case relied directly on the controlling Commissioners' erroneous legal reasoning. Prosecutorial discretion thus was not a distinct basis for the dismissals. As a result, the Court has a standard by which to review the controlling Commissioners' decision—namely, a proper interpretation of the relevant law—and review of their legal reasoning would not risk an advisory

opinion, as there is no independent and adequate alternative basis for the dismissals. Thus, because the dismissals rested on erroneous legal reasoning, this Court may review them.

D. The Dismissals Are Reviewable Because the Invocation of Prosecutorial Discretion Was Pretextual

Agency action is contrary to law when the agency's explanation for taking that action is pretextual. *See Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573-76 (2019); *Orloski v. FEC*, 795 F.2d 156, 161 (D.C. Cir. 1986). As Plaintiff's dispositive motion explains, *see* ECF No. 23 at 44-45, the controlling Commissioners' Statement of Reasons indicates that they first reached a substantive conclusion that the Candidacy Filing allegations did not merit a reason-to-believe finding, then reverse-engineered a pretextual prosecutorial discretion rationale to justify that conclusion. The controlling Commissioners concluded that the merits of ECU's soft-money allegations did not warrant a reason-to-believe finding. And their Statement of Reasons concedes that the merits of ECU's soft-money allegations *turn on those of the Candidacy Filing claims*—the two sets of allegations rely on similar evidence regarding Scott's activities as New Republican's Chair, AR212, and, as a legal matter, "New Republican can commit a soft money violation only if Scott is a candidate," AR209. To reach their conclusion that there was no reason to believe that soft-money violations had occurred, *see* AR212, the controlling Commissioners must therefore have determined that the merits of the Candidacy Filing allegations similarly did not justify a reason-to-believe finding. Indeed, the Statement of Reasons itself states that the controlling Commissioners "[we]re not persuaded" by the General Counsel's recommendation that the Commission find reason to believe the Candidacy Filing allegations. AR209.

The record thus shows that the controlling Commissioners' invocation of prosecutorial discretion was pretextual—retrofitted to shield their substantive conclusion about the merits of ECU's allegations from review. This reliance on pretext distinguishes this case from *CREW 2018*

and *CREW 2021*, renders the dismissals contrary to law, and therefore cannot insulate those dismissals from review.

CONCLUSION

For these reasons, Plaintiff respectfully requests that the Court deny Intervenor's motion to dismiss.

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Respectfully submitted,

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